RECORD AND BRIEFS



FILED
FEB - 3 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
# Supreme Court of the United States

CHARLES S. TURNER, et al.,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

RUSSELL L. OVERTON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writs Of Certiorari To The District Of Columbia Court Of Appeals**

## BRIEF OF AMICI CURIAE TEXAS PUBLIC POLICY FOUNDATION, FREEDOMWORKS, CAUSE OF ACTION INSTITUTE, AND AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF PETITIONERS AND URGING REVERSAL

ROBERT HENNEKE
Director, CENTER FOR THE AMERICAN FUTURE
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, TX 78701
(512) 472-2700

JOHN D. CLINE
*Counsel of Record*
LAW OFFICE OF JOHN D. CLINE
235 Montgomery Street
Suite 1070
San Francisco, CA 94104
(415) 662-2260
cline@johndclinelaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Board of Congress

## QUESTION PRESENTED

Whether the petitioners' convictions must be set aside under *Brady v. Maryland*, 373 U.S. 83 (1963).

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

INTEREST OF AMICI CURIAE ..... 1

SUMMARY OF THE ARGUMENT ..... 2

ARGUMENT ..... 5

I. THE *BRADY* MATERIALITY REQUIREMENT HAS PROVEN UNWORKABLE IN PRACTICE. ..... 5

II. EFFORTS TO MAKE *BRADY* WORKABLE HAVE FAILED ..... 11

III. THE COURT SHOULD CLARIFY THAT THE PROSECUTOR HAS A DUTY TO DISCLOSE ALL FAVORABLE EVIDENCE AND APPLY THE *CHAPMAN* HARMLESS ERROR STANDARD TO VIOLATIONS OF THAT DUTY ..... 17

A. The Prosecutor's Pretrial Disclosure Obligation. ..... 18

B. Harmless Error. ..... 21

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

### CASES

*Arizona v. Fulminante*,
499 U.S. 279 (1991) ..... 21

*Boyd v. United States*,
908 A.2d 39 (D.C. 2006) ..... 14

*Brady v. Maryland*,
373 U.S. 83 (1963) .....*passim*

*Brecht v. Abrahamson*,
507 U.S. 619 (1993) ..... 21

*Chapman v. California*,
386 U.S. 18 (1967) ..... 4, 21

*Cone v. Bell*,
556 U.S. 449 (2009) ..... 14

*Connick v. Thompson*,
563 U.S. 51 (2011) ..... 9

*Goeke and Bottini v. Department of Justice*,
2015 MSPB 1 (Jan. 2, 2015) ..... 12

*Goeke and Bottini v. Department of Justice*,
Docket No. CB-0752-15-0228-A-1
(MSPB Aug. 12, 2016) ..... 12

*Kyles v. Whitley*,
514 U.S. 419 (1995) ..... 3, 5, 9, 10, 14, 21

*Smith v. Cain*,
565 U.S. 73 (2012) ..... 20

*Smith v. Secretary*,
50 F.3d 801 (10th Cir. 1995) ..... 18

*Strickland v. Washington*,
466 U.S. 668 (1984) ..... 7

*Strickler v. Greene*,
527 U.S. 263 (1999) ..... 5

*United States v. Acosta*,
357 F. Supp. 2d 1228 (D. Nev. 2005).. 15

*United States v. Carter*,
313 F. Supp. 2d 921 (E.D. Wis. 2004) 14

*United States v. Causey*,
356 F. Supp. 2d 681 (S.D. Tex. 2005). 14

*United States v. Mazzarella*,
784 F.3d 532 (9th Cir. 2015)..... 13

*United States v. Morales*,
746 F.3d 310 (7th Cir. 2014)..... 16, 17

*United States v. Olsen*,
737 F.3d 625 (9th Cir. 2013)..... 8, 9, 16

*United States v. Olsen*,
704 F.3d 1172 (9th Cir. 2013)..... 14

*United States v. Safavian*,
233 F.R.D. 12 (D.D.C. 2005) ..... 6, 14

*United States v. Sudikoff*,
36 F. Supp. 2d 1196 (N.D. Cal. 1999). 14

*Wearry v. Cain*,
136 S. Ct. 1002 (2016)..... 2, 5, 9, 10, 20

## STATUTES AND RULES

Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong., 2d Sess. (Mar. 15, 2012) ..... 12, 13

Fed. R. Crim. P. 16..... 13

Sup. Ct. R. 37.3(a)..... 1

Sup. Ct. R. 37.6 ..... 1

Local Rules, United States District Court, Southern District of Alabama, Criminal L.R. 16(b)(1)(B)..... 15

Local Rules, United States District Court, Northern District of Florida, Rule 26.2(D) ..... 15

Local Rules of the United States District Court for the District of Massachusetts, Rule 116.2 ..... 15

**OTHER AUTHORITIES**

Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587 (2006) ..... 7

American Bar Association Resolution 105D and Report Regarding Disclosure Rules (Aug. 8-9, 2011) ..... 12, 13

American Bar Association, Model Rules of Professional Conduct, Rule 3.8(d) ..... 15

Rob Cary, *Not Guilty: The Unlawful Prosecution of U.S. Senator Ted Stevens* (Thompson Reuters 2014 ..... 12

John R. Emshwiller & Evan Perez, *Prosecutors Seldom Punished for Misconduct*, Wall Street Journal, Oct. 4, 2010 ..... 8

Federal Judicial Center, *A Summary of Responses to a National Survey of Rule 16 Disclosure Practices in Criminal Cases* (Feb. 2011) ..... 12

Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 Mercer L. Rev. 639 (2013) ..... 13

Janet C. Hoeffel & Stephen L. Singer, *Activating a* Brady *Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. Rev. L. & Soc. Change 467 (2014) ..... 14

John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013) ..... 7, 11

David Keenan, Deborah J. Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. Online Forum (Oct. 25, 2011) ..... 8

Alex Kozinski, *Preface: Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii (2015) ..... 13

Los Angeles Times, Editorial, *Defending the Brady Rule: Reforms Are Needed To Make Sure Prosecutors Share All Evidence That Could Be Helpful to Defendants*, Nov. 21, 2011 ..... 12

Los Angeles Times, Editorial, *Don't Ignore the Brady Rule: Evidence Must Be Shared*, Dec. 29, 2013 ..... 12

New York Times, Editorial, *Justice and Open Files*, Feb. 26, 2012 ..... 12

New York Times, Editorial, *Rampant Prosecutorial Misconduct*, Jan. 4, 2014..... 12

Norman L. Reimer, *Federal Discovery Reform: DOJ's Baby Steps Are Inadequate*, The Champion, March 2010, at 7 ..... 13

Kathleen Ridolfi, Tiffany M. Joslyn & Todd H. Fries, *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases* (NACDL and Veritas Initiative 2014) ..... 10, 17

Joel B. Rudin, *Taking Prosecutorial Misconduct 'Unseriously': Brady Violations and the Myth of Professional Accountability*, The Champion, Dec. 2012, at 30 ..... 8

Budish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 Lewis & Clark L. Rev. (forthcoming 2017) ..... 9

*Smith v. Cain*, No. 10-8145, Oral Argument Transcript (Nov. 8, 2011) ..... 19, 20

## INTEREST OF AMICI CURIAE[1]

The Texas Public Policy Foundation is a nonprofit, nonpartisan research organization based in Austin, Texas, and is dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach. Since its inception in 1989, the Foundation has emphasized the importance of limited government, private enterprise, private property rights, and the rule of law. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to advance principles of liberty and the Constitution.

The mission of FreedomWorks is to build, educate, and mobilize the largest network of activists advocating the principles of smaller government, lower taxes, free markets, personal liberty, and the rule of law.

Cause of Action Institute ("CoA") is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law work together to protect liberty and economic opportunity. As part of this mission, CoA works to expose and prevent government and agency misuse of power by, *inter*

[1] Under S.Ct. R. 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent from all parties are being lodged with the Court under Rule 37.3(a).

*alia*, appearing as amicus curiae before this and other federal courts. *E.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA has a particular interest in challenging government overreach in the criminal justice system and in working to combat the criminalization of conduct that can be addressed through existing civil law—*i.e.*, the process of "overcriminalization." In order to fulfill this mission, CoA has represented criminal defendants in federal court, *e.g.*, *United States v. Black*, No. CR 12-0002 (N.D. Cal.) (involving a Marine Mammal Protection Act regulation criminalizing "feeding" certain marine mammals without a permit), appeared as amicus curiae in *Yates v. United States*, 135 S. Ct. 1074 (2015), at both the merits stage and in support of the petition for a writ of certiorari, and appeared as amicus curiae to argue for the application of the *Brady v. Maryland* standard in a civil case, *United States v. Sierra Pacific Industries, Inc., et al.*, No. 15-15799 (9th Cir. 2015).

The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan individual membership association of state legislators. Approximately 25% of state legislators are ALEC members. It serves to advance limited government, free markets, and federalism.

## SUMMARY OF THE ARGUMENT

1. As petitioners' briefs demonstrate, the Court should reverse the judgment below under settled law, including *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (per curiam), and *Kyles v. Whitley*, 514 U.S.

419 (1995). But the case also affords an opportunity to clarify and strengthen the *Brady* disclosure obligation. In particular, the Court should hold that the government violates the defendant's right to due process when it suppresses favorable evidence, regardless of the potential effect of that evidence on the outcome of a future trial. On appeal, the Court should abandon the current materiality standard and instead require reversal of the conviction for failure to disclose favorable evidence unless the government can establish that the error is harmless beyond a reasonable doubt.

2. The materiality component of *Brady*, as applied by the courts, has robbed the doctrine of much of its force. In the pretrial context, materiality requires prosecutors to anticipate, before they even know the outlines of the defense, whether disclosure of a particular piece of favorable evidence has a reasonable probability of producing a different outcome in a yet-to-be-held trial. That is a difficult task even for a conscientious prosecutor. For an unethical or indifferent prosecutor, a pretrial materiality requirement is an invitation to withhold favorable evidence based on an asserted perception that the evidence against the defendant is overwhelming, or to not look for such evidence in the first place.

The materiality requirement has proven unworkable on appeal as well. To obtain reversal, the defendant has the burden of establishing that the suppressed evidence was material. That can be hard to show on a cold record, given the complex mix of evidence that most trials produce. In light of the

inherent uncertainty in assessing the impact of an undisclosed piece of evidence, appellate courts find in the overwhelming majority of cases that the failure to disclose was not material. And because convictions are rarely reversed even when the prosecution suppresses favorable evidence, prosecutors have little incentive to take their disclosure obligations seriously.

3. Efforts to correct the problems with materiality have fallen short. Federal legislation requiring disclosure of favorable evidence regardless of materiality has failed because of trenchant Department of Justice resistance. Even if such legislation were ultimately enacted, it would not address application of *Brady* in state prosecutions. Pretrial rulings by some district courts ordering production of favorable evidence without regard to materiality are in tension with this Court's decisions and do not solve the problem that the materiality requirement presents on appeal. Other judicial approaches have similarly fallen short. The solution to the materiality problem thus lies with this Court.

4. By clarifying that prosecutors have a duty to disclose favorable evidence regardless of its potential effect on the outcome of a future trial, the Court will draw a clear constitutional line, consistent with the fairness principle that undergirds *Brady*. Prosecutors will have no doubt about the scope of their duty to disclose: if evidence is favorable, either because it exculpates the defendant or impeaches a prosecution witness, it must be produced to the defense. On appeal, replacing the materiality standard with the well-established *Chapman*

constitutional harmless error test will provide robust protection to the defendant's right to due process while avoiding reversals where the undisclosed evidence is truly trivial or unimportant.

## ARGUMENT

### I. THE *BRADY* MATERIALITY REQUIREMENT HAS PROVEN UNWORKABLE IN PRACTICE.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In later cases, the Court concluded that suppressed evidence is "material" if there is "any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (quotations omitted); *see, e.g., Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). A *Brady* violation thus has three components under current law: evidence must be favorable to the defense, it must be suppressed, and it must be material. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

As applied by prosecutors and the lower courts, the *Brady* materiality requirement has robbed the disclosure obligation of much of its force. That requirement has several problems. First, to the extent materiality defines the government's duty of disclosure, it forces prosecutors to anticipate before

trial, and often before they even know the outlines of the defense, whether disclosure of a particular piece of favorable evidence has a "reasonable likelihood" of producing a different outcome. That is a difficult task even for conscientious prosecutors. As one experienced district judge (and former prosecutor) explained:

> Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones).

*United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (Friedman, J.). As *Safavian* suggests, both the inherent uncertainty of how the trial will unfold and the tendency of even the most fair-minded prosecutor to view his case as strong and his witnesses as

credible make materiality unworkable as a disclosure standard.[2] Professor Jeffries put the point this way:

> [Prosecutors are] hard-charging, competitive lawyers whose reputations and satisfactions depend on obtaining convictions. To that end, they construct a narrative of the case that aligns the evidence with a verdict of guilty. *Brady* requires not only that zealous prosecutors help the opposition, but that they do so by crediting a version of the evidence at odds with their understanding. Both common sense and cognitive psychology confirm the difficulty of that task.

John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 228 (2013).

For the unethical or indifferent prosecutor, limiting the *Brady* disclosure obligation to material

---

[2] *See, e.g.*, Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1593-1613 (2006) (discussing cognitive biases that affect prosecutorial decision-making). The burden that *Brady* places on prosecutors to view the yet-to-be-tried case prospectively contrasts with the other context where the materiality standard is used: ineffective assistance of counsel claims. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 694 (1984) (to establish ineffective assistance, defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Ineffective assistance claims are always raised post-trial and are always retrospective. Thus, it makes sense to focus on the effect counsel's substandard performance had on the proceeding. A *Brady* materiality requirement, by contrast, forces prosecutors to anticipate the effect particular evidence would have on a proceeding that has not yet occurred.

evidence is an invitation to withhold, or not search for, favorable evidence based on the prosecutor's asserted perception that the evidence against the defendant is overwhelming. Such a prosecutor has almost no incentive to find and disclose evidence favoring the defense. If he does so, the government's case will be weakened, and the chances of losing (with the resulting professional opprobrium) will increase. If the prosecutor ignores or withholds the evidence, on the other hand, there is a good chance it will never come to light. If the evidence does surface, the prosecutor can always argue that the defendant has not established that it was material. And even if the evidence is ultimately found to be material, the prosecution is no worse off than if it had disclosed the information in the first place; it merely "gets a do-over," with the defense given the benefit of the favorable information. *United States v. Olsen*, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) ("*Olsen* Dissent").

Nor does the prospect of professional discipline or civil liability provide the necessary incentive for the unethical or indifferent prosecutor to disclose favorable evidence. Professional discipline is virtually nonexistent for prosecutors who commit *Brady* violations,[3] and this Court has made civil suits

---

[3] *See, e.g.*, David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. Online, Forum (Oct. 25, 2011); John R. Emshwiller and Evan Perez, *Prosecutors Seldom Punished for Misconduct*, Wall Street Journal, Oct. 4, 2010; Joel B. Rudin, *Taking Prosecutorial*

based on *Brady* practically impossible to maintain. *Connick v. Thompson*, 563 U.S. 51 (2011).[4] In short, "A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence." *Olsen* Dissent, 737 F.3d at 630.

The materiality requirement has proven unworkable on appeal as well as in the pretrial context. This Court has made clear in case after case that materiality should impose only a modest impediment to reversal when the prosecution has suppressed favorable evidence. The defendant need not "demonstrat[e] by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434; *see, e.g., Wearry*, 136 S. Ct. at 1006. Nor is the materiality standard a "sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35. And the materiality of undisclosed, favorable information must be "considered collectively, not item by item." *Id.* at 436. Under this standard, a defendant can obtain reversal on a *Brady* claim "even if . . . the undisclosed information may not have

---

*Misconduct 'Unseriously': Brady Violations and The Myth of Professional Accountability*, The Champion, Dec. 2012, at 30.

[4] *See, e.g.*, Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 Lewis & Clark L. Rev. (forthcoming 2017) (discussing the weaknesses in the current modes of prosecutorial accountability) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909254).

affected the jury's verdict." *Wearry*, 136 S. Ct. at 1006 n.6.

Despite the low threshold this Court has set, appellate courts rarely find suppressed, favorable evidence material under *Brady*. A study undertaken by the National Association of Criminal Defense Lawyers and the Veritas Initiative of the Santa Clara University School of Law confirms this point.[5] An examination of a random sample of 620 federal *Brady* decisions revealed that, out of 145 decisions in which prosecutors were found to have withheld favorable information, the defense prevailed in just 21--14% of the total. Material Indifference at xi, 21, 45.

What accounts for this low reversal rate, given this Court's relaxed materiality standard? Most significantly, the defendant has the burden on appeal of showing that the suppressed evidence was material. *See, e.g., Wearry*, 136 S. Ct. at 1006 (describing what defendant "must show" to establish materiality); *Kyles*, 514 U.S. at 436 (*Brady* materiality standard "impose[s] a higher burden on the defendant" than the *Kotteakos* harmless error standard) (quotation omitted).[6] That can be a difficult burden to meet, given the complex mix of evidence that most trials produce and the difficulty of gleaning

---

[5] Kathleen Ridolfi, Tiffany M. Joslyn & Todd H. Fries, *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases* at xi (NACDL and Veritas Initiative 2014) ["Material Indifference"] (available at https://www.nacdl.org/discoveryreform/materialindifference/).

[6] As discussed below, the materiality requirement differs in this respect from the usual harmless error standard for constitutional violations, which requires the government to establish harmlessness beyond a reasonable doubt.

the dynamics of a trial from a cold record. Moreover, appellate judges have a natural reluctance to overturn a conviction and require a second trial, especially when the judges think the likelihood of a second conviction is substantial.

These two factors--the allocation of the burden on materiality and appellate courts' urge to achieve finality in criminal cases--likely account for the extraordinary affirmance rate that the Material Indifference study reveals. But those routine affirmances carry a significant cost--most obviously in fairness to the defendants involved, but also to the criminal justice system as a whole. As Professor Jeffries correctly observes, "Prosecutors facing this forgiving regime may be expected to skimp on *Brady*, and by all accounts they do."[7]

## II. EFFORTS TO MAKE *BRADY* WORKABLE HAVE FAILED.

In 2009, the prosecution of Senator Ted Stevens collapsed following disclosure of massive and systematic *Brady* violations. Senator Stevens' salvation, however, was largely a matter of happenstance. Despite repeated defense claims of *Brady* violations during trial, the prosecution insisted that any nondisclosures were inadvertent and immaterial. The district court expressed concern but declined to impose any meaningful sanction. The jury returned a guilty verdict, and Senator Stevens prepared for prison after a distinguished record of service to his country. Fortuitously, however, a

---

[7] Jeffries, *supra*, 99 Va. L. Rev. at 230.

disgruntled FBI agent came forward after the verdict and revealed that the prosecution team had concealed crucial impeachment evidence concerning its star witness. Following that revelation, the case quickly unraveled.[8]

In the wake of the Stevens travesty, there were calls for *Brady* reform from many quarters. The American Bar Association House of Delegates adopted a resolution calling for legislation to codify the prosecutor's duty to provide exculpatory evidence.[9] Major newspapers editorialized in favor of reform.[10] Most significantly, a bipartisan group of Senators introduced the Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong., 2d Sess. (Mar. 15, 2012), which would have codified the prosecution's duty to produce favorable evidence. These calls for reform had a common theme: they

---

[8] For an account of the Stevens prosecution, see Rob Cary, *Not Guilty: The Unlawful Prosecution of U.S. Senator Ted Stevens* (Thompson Reuters 2014). The prosecutors who suppressed favorable evidence in *Stevens* received brief suspensions from DOJ. Even that minimal discipline was later overturned by the Merit Systems Protection Board (which ordered DOJ to pay the prosecutors' legal fees). *Goeke and Bottini v. Department of Justice*, 2015 MSPB 1 (Jan. 2, 2015); *Goeke and Bottini v. Department of Justice*, Docket no. CB-0752-15-0228-A-1 (MSPB Aug. 12, 2016).

[9] American Bar Association Resolution 105D and Report Regarding Disclosure Rules (August 8-9, 2011) ["ABA Resolution"] (available at http://www2.nycbar.org/pdf/ABA105D.pdf).

[10] *E.g.*, New York Times, Editorial, *Justice and Open Files*, Feb. 26, 2012; New York Times, Editorial, *Rampant Prosecutorial Misconduct*, Jan. 4, 2014; Los Angeles Times, Editorial, *Defending the Brady Rule: Reforms Are Needed To Make Sure Prosecutors Share All Evidence That Could Be Helpful To Defendants*, Nov. 21, 2011; Los Angeles Times, Editorial, *Don't Ignore the Brady Rule: Evidence Must Be Shared*, Dec. 29, 2013.

advocated abandoning the *Brady* materiality requirement as a limit on the prosecutor's disclosure duty.

The Department of Justice fiercely resisted these reform efforts, just as it had resisted previous efforts--urged by, among others, the American College of Trial Lawyers--to codify *Brady* without a materiality requirement in Fed. R. Crim. P. 16.[11] DOJ successfully opposed the Fairness in Disclosure of Evidence Act.[12] It touted its own post-*Stevens* reform efforts, most notably through a series of internal memoranda issued January 4, 2010 by then-Deputy Attorney General David Ogden.[13] But the Ogden Memoranda did little to solve the problems that plague *Brady*. They maintained the materiality requirement as a limit on the duty of disclosure, provided defendants with no enforceable rights, *see, e.g., United States v. Mazzarella*, 784 F.3d 532, 541-42 (9th Cir. 2015), and left much to the discretion of local federal prosecutors.[14] And of course the Ogden

[11] For descriptions of DOJ's efforts to thwart reform legislation, see, *e.g.*, ABA Resolution at 3-4; Federal Judicial Center, *A Summary of Responses to a National Survey of Rule 16 Disclosure Practices in Criminal Cases* 3-4 (Feb. 2011).

[12] *See, e.g.*, Hon. Alex Kozinski, *Preface: Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxvii (2015) ("Despite support from both Democrats and Republicans, the bill has made no progress toward passage because of steadfast opposition from the U.S. Department of Justice."); Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 Mercer L. Rev. 639, 652-55 (2013) (describing proposed Senate legislation and DOJ opposition).

[13] The Ogden Memoranda are available at http://www.justice.gov/dag/mem-orandum-department-prosecutors.

[14] For critiques of the Ogden Memoranda, see, *e.g.*, ABA Resolution at 5-6; Norman L. Reimer, *Federal Discovery Reform:*

Memoranda had no bearing on the practices of state and local prosecutors. Eight years after the *Stevens* debacle, it is clear that efforts to reform *Brady* through legislation are doomed in the face of trenchant DOJ and other prosecutorial resistance.

Judicial efforts to address the problems with the *Brady* materiality component have likewise fallen short. Some federal district courts have held that, in the pretrial context, *Brady* requires production of all favorable evidence, regardless of its materiality.[15] This approach has several weaknesses as matters stand now. First, this Court has at times appeared to limit the government's disclosure obligation to favorable evidence that is material. In *Kyles*, for example, the Court declared that "the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." *Kyles*, 514 U.S. at 437; *see, e.g., Cone v. Bell*, 556 U.S. 449, 470 (2009) ("[F]avorable evidence is subject to constitutionally mandated disclosure when it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.") (quotation omitted). The

---

*DOJ's Baby Steps Are Inadequate*, The Champion, March 2010, at 7.

[15] *See, e.g., Safavian*, 233 F.R.D. at 16; *United States v. Carter*, 313 F. Supp. 2d 921, 924-25 (E.D. Wis. 2004); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999); *see also United States v. Olsen*, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013) (adopting this position in dictum). *But see United States v. Causey*, 356 F. Supp. 2d 681, 696 (S.D. Texas 2005) (declining to adopt this approach); *Boyd v. United States*, 908 A.2d 39, 59-61 (D.C. 2006) (same).

district court decisions requiring pretrial disclosure without regard to materiality stand in some tension with the Court's language in *Kyles*, *Cone*, and other cases.[16]

Recognizing this problem, at least one district court eschewed *Brady* as a basis for requiring pretrial disclosure of all favorable evidence and relied instead on the prosecutor's ethical obligations. *See United States v. Acosta*, 357 F. Supp. 2d 1228 (D. Nev. 2005); *see also* American Bar Association, Model Rules of Professional Conduct, Rule 3.8(d) (prosecutor's disclosure duty extends to all favorable evidence). The *Acosta* approach does not solve the materiality problem, however, because it is subject to state-by-state variations in the ethical rules governing the prosecutor's disclosure obligation, and, in the view of some courts, those rules may not provide a basis for ordering discovery. Similarly, some federal district courts have adopted local rules that require disclosure of favorable evidence, regardless of its potential effect on the outcome of the trial.[17] But this approach too leaves significant gaps, because local rules vary from

---

[16] The quoted language from *Kyles* and *Cone* may well be dictum. *See, e.g.*, Janet C. Hoeffel & Stephen I. Singer, *Activating A* Brady *Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. Rev. L. & Soc. Change 467, 469-73 (2014). Nonetheless, most prosecutors and courts treat it as establishing the scope of the prosecutor's disclosure duty.

[17] *E.g.*, Local Rules, United States District Court, Southern District of Alabama, Criminal L.R. 16(b)(1)(B); Local Rules, United States District Court, Northern District of Florida, Rule 26.2(D)(1)-(3); Local Rules of the United States District Court for the District of Massachusetts, Rule 116.2.

district to district and in any event have no bearing on the practices of state and local prosecutors.

Apart from the problems outlined above, the district court decisions requiring pretrial disclosure of all favorable evidence do not address the obstacle that the materiality requirement presents on appeal. Even if materiality is viewed solely as a form of harmless error doctrine, inapplicable in the pretrial context, it still permits appellate courts to reject *Brady* claims and affirm convictions whenever the defendant cannot establish that disclosure would have created a reasonable probability of a different outcome. Contrary to the evident intent of *Wearry*, *Kyles*, and other cases, this burden has proven unduly difficult for defendants to meet, as demonstrated in the Material Indifference study.

Some appellate judges have expressed dismay at the feeble enforcement of *Brady* caused by an overly strict reading of the materiality requirement. Most notably, then-Ninth Circuit Chief Judge Kozinski declared in 2013, "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." *Olsen* Dissent, 737 F.3d at 626. A year later, Seventh Circuit Chief Judge Wood lamented, "One would think that by now failures to comply with [*Brady*] would be rare. But *Brady* issues continue to arise. Often, non-disclosure comes at no price for prosecutors, because courts find that the withheld evidence would not have created a 'reasonable probability of a different result.'" *United States v. Morales*, 746 F.3d 310, 311 (7th Cir. 2014) (quoting *Kyles*, 514 U.S. at 434). But these occasional expressions of appellate dismay have had little effect.

In *Olsen* itself, for example, Judge Kozinski attracted the votes of only four of his colleagues, and rehearing en banc was denied. And in *Morales* the court of appeals found the suppressed evidence not material, despite the court's concerns about prosecutorial impunity. *Id.* at 315-18. As this case demonstrates (and as the Material Indifference study confirms), appellate courts continue to rely on an overly strict interpretation of the materiality requirement to affirm the overwhelming majority of convictions even where prosecutors suppress favorable evidence.

Neither Congress nor the lower courts have been able to solve the problems that the *Brady* materiality requirement presents. The solution lies with this Court.

## III. THE COURT SHOULD CLARIFY THAT THE PROSECUTOR HAS A DUTY TO DISCLOSE ALL FAVORABLE EVIDENCE AND APPLY THE *CHAPMAN* HARMLESS ERROR STANDARD TO VIOLATIONS OF THAT DUTY.

For the reasons outlined in petitioners' briefs, the Court can and should reverse the judgment below based on the materiality standard outlined in *Wearry* and *Kyles*. But the Court should also take the opportunity to clarify and strengthen *Brady*'s fairness mandate. In particular, the Court should hold that the government violates the defendant's right to due process when it suppresses favorable evidence, regardless of the potential effect of that evidence on the outcome of a future trial.

On appeal, the Court should abandon the current materiality standard and instead require reversal of the conviction for failure to disclose favorable evidence unless the government can establish that the error is harmless beyond a reasonable doubt. We address the trial-level and harmless error standards in turn.

### A. The Prosecutor's Pretrial Disclosure Obligation.

Requiring production of all favorable evidence solves the problem that prosecutors face in administering the current materiality standard. Prosecutors will no longer have to predict whether particular pieces of favorable evidence, viewed cumulatively, have a reasonable probability of affecting the outcome of the trial. If the evidence is favorable, it will have to be produced. Prosecutors will have little difficulty recognizing "favorable" evidence. *Any* evidence that tends to negate one of the elements of the offense, to establish an affirmative defense, or to impeach a prosecution witness is favorable.[18]

This approach aligns with the interpretation some district courts have given *Brady* in the pretrial

---

[18] A strong argument can be made that the Constitution requires disclosure of *all* relevant evidence to a criminal defendant, whether favorable or not, subject only to limits based on a showing of good cause (such as witness protection). Such an "open file" rule would satisfy due process (provided the "file" encompassed all relevant material in the hands of the police, as well as the prosecutors, and included impeachment material, *see, e.g., Smith v. Secretary*, 50 F.3d 801, 828 (10th Cir. 1995)), and it would go a long way toward ensuring fairness and eliminating the "sporting theory" of criminal justice.

context. *See supra* at 14 & n.15. It also corresponds to views expressed at oral argument by some Members of the Court about how *Brady* should work in practice. In *Smith v. Cain*, No. 10-8145, the state sought to defend its nondisclosure of favorable evidence on the ground that the evidence was not material. *E.g.*, Oral Argument T. at 29 (Nov. 8, 2011). Several Justices appeared to distinguish between the prosecutor's duty to disclose and the standard for reversal on appeal. Justice Kennedy, for example, declared:

> And with all respect, I think you misspoke when you--you were asked what is--what is the test for when Brady material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a Brady violation. You don't determine your Brady obligation by the test for the Brady violation. You're transposing two very different things.

*Id.* at 48-49. Justice Ginsburg added, "There was a prior inconsistent statement. Shouldn't that be the end of it? A prior inconsistent statement, one that is favorable to the defense, has to be turned over, period. I thought was what Brady requires." *Id.* at 51. Justice Scalia suggested that the state "stop fighting as to whether it should be turned over[.] Of course it should have been turned over. I think the case you're making is that it wouldn't have made a difference. . . . And--and that's a closer case, perhaps, but surely it

should have been turned over. Why don't you give that up?" *Id.* at 51-52. Justice Sotomayor observed, "I said there were two prongs to Brady. Do you have to turn it over, and, second, does it cause harm. And the first one you said not. That--it is somewhat disconcerting that your office is still answering unequivocally on a basic obligation as one that requires you to have turned these materials over . . . whether it caused harm or not." *Id.* at 53; *see also Wearry*, 136 S. Ct. at 1008 (Alito, J., dissenting) ("There is no question in my mind that the prosecution should have disclosed this information, but whether the information was sufficient to warrant reversing petitioner's conviction is another matter.").[19]

Questions and statements during oral argument, of course, do not bind the Court or individual Justices. But the observations quoted above reflect a crucial distinction--not clearly expressed in the Court's decisions--between the prosecutor's duty to disclose favorable evidence on one hand and the consequences of a breach of that duty on the other. The Court should clarify that the *Brady* obligation corresponds to the understanding expressed in the *Smith* argument: prosecutors must disclose all favorable evidence, regardless of the prejudice, or lack of prejudice, that nondisclosure might cause the defense.

---

[19] Because the suppressed evidence in *Smith* "plainly" met the materiality standard, the Court did not have occasion to address the prosecutor's pretrial duty to disclose favorable evidence regardless of its materiality. *Smith v. Cain*, 565 U.S. 73, 76 (2012).

### B. Harmless Error.

Once the duty of disclosure is clarified, the Court should determine the proper harmless error standard for violations of that duty. It could retain materiality for that purpose (although not as a component of the constitutional duty itself). But this approach would leave the practical effect of *Brady* largely unchanged. Appellate courts would continue to excuse the vast majority of *Brady* violations, and prosecutors would take that forgiving attitude into account in deciding what to disclose. Instead, having defined the constitutional violation as the suppression of favorable evidence, the Court should apply the ordinary constitutional harmless error standard: the conviction will be reversed unless the government can establish that the failure to disclose was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see, e.g., Arizona v. Fulminante*, 499 U.S. 279, 295 (1991).[20]

This settled standard affords substantial protection to the due process right that *Brady* recognized, while avoiding reversals "for small errors or defects that have little, if any, likelihood of having changed the result of the trial." 386 U.S. at 22. The stringent *Chapman* harmless error standard will give prosecutors a far stronger incentive than they have now to take seriously their disclosure obligations.

---

[20] On habeas review of state convictions, the Court would presumably apply the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to *Brady* claims, as it does to other constitutional claims. As *Kyles* makes clear, even the *Brecht* harmless error standard is more protective of the constitutional right at issue than the *Brady* materiality standard. *Kyles*, 514 U.S. at 435-36.

And it will avoid results such as occurred here, where the government indisputably suppressed favorable evidence, but lower courts nonetheless upheld the convictions because they concluded (erroneously, as petitioners demonstrate in their briefs) that the defendants had not established that the suppressed evidence was material. If the burden were placed instead on the prosecution to show harmlessness beyond a reasonable doubt, as it is for most other constitutional violations, cases such as this would be far more easily resolved in favor of a new trial.

## CONCLUSION

The judgment of the District of Columbia Court of Appeals should be reversed.

Respectfully submitted,

JOHN D. CLINE
*Counsel of Record*
Law Office of John D. Cline
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 662-2260

February 2017